November 1983 in the light of the concern about the interpretation and application of the United States *Foreign Sovereign Immunities Act of 1976*.[15] At the time, the Legal Advisers had taken the view that the Committee should await the final outcome of the work of the Commission before making any recommendation. At its 1985 session, however, the Committee had decided to examine the matter at the earliest possible opportunity. The two main concerns of its member Governments were, first, the extent to which a country's courts could exercise jurisdiction over foreign Governments or governmental agencies in respect of transactions which were to be performed chiefly outside the country, and secondly, the question whether the term "commercial transaction" could be taken to include cases in which the purpose of the transaction was directly bound up with the exercise of governmental functions.

37. Personally, he considered that a restrictive doctrine was perhaps not out of place, in view of the extension of governmental activity in numerous fields. The problem was to determine the extent to which restrictions would be reasonable. At some stage, it might prove necessary for Governments to decide on a firm policy and enact legislation or issue rules on the matter, instead of leaving it to the judicial branch to decide in each case. In that respect, the Commission's work would be of immense assistance, regardless of whether a convention ultimately emerged from the draft articles, which were, by and large, a balanced compromise formula and afforded a sound basis for those engaged in drafting national legislation.

38. The Committee had taken up the topic of international watercourses as early as 1967, but had suspended work on it in 1973, because it had been included in the Commission's agenda. At its 1983 session, the Committee had decided to place the item on its agenda again, but even then the majority of the members had thought it better to await the final recommendations of the Commission. He therefore sincerely hoped that the Commission would complete its work on the topic in the near future.

39. Since he would shortly be relinquishing his duties as Secretary-General of the Committee, he wished to express his gratitude to the Chairman, previous chairmen, officers and members of the Commission, and to the Secretary of the Commission, for all the co-operation extended to the Committee for so many years. It had been for him a unique and most rewarding experience to promote the continuing and close co-operation between the two bodies and he hoped that the relationship between the Commission and the Committee would continue to grow and prosper.

40. The CHAIRMAN thanked Mr. Sen for the interesting information he had provided on the role and activities of the Asian-African Legal Consultative Committee and on the outcome of the Committee's session at Arusha. The initiatives by the Committee to strengthen still further the ties of co-operation with the United Nations were most gratifying. The active collaboration between the Committee and the Commission on such matters as the jurisdictional immunities of States and the situation of refugees viewed from the standpoint of the doctrine of State responsibility could not fail to be beneficial to the progressive development and codification of international law.

41. Sir Ian SINCLAIR said that he had had the privilege of attending two sessions of the Asian-African Legal Consultative Committee as the Observer for the United Kingdom Government. As someone familiar with its work, he could testify to the thoroughness and ability with which the Committee considered the topics that came before it. Mr. Sen had played a paramount role in the Committee's achievements and he wished to pay a warm and sincere tribute to him on the occasion of his retirement from the office of Secretary-General. At the same time, he wished the Committee itself every success in its work on issues which were so closely related to the topics on the Commission's own agenda.

42. Mr. SUCHARITKUL said that he was one of the longest-standing members of the Asian-African Legal Consultative Committee and could affirm that the devoted work of Mr. Sen had played a very important part in the extraordinary growth of the Committee, from a body with a very small membership in the early years to one that was now a very great undertaking.

43. Chief AKINJIDE said that he wished to join in the tributes paid to Mr. Sen, with whom he had been privileged to work for four years. It was interesting to note that the Asian-African Legal Consultative Committee was considering the grave question of the debt burden of the developing countries. Asia and Africa included some of the poorest nations in the world, but also some of the richest. It was to be hoped that a more equitable distribution of wealth would be achieved some day. He expressed the hope that the Committee's work would help in finding an acceptable solution to the very serious problem of the debt burden of the developing countries.

The meeting rose at 12.40 p.m.

1959th MEETING

Wednesday, 4 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat.

[15] See 1944th meeting, footnote 5.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/387,[2] A/CN.4/398,[3] A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART I (Crimes against humanity)

PART II (War crimes) *and*

PART III (Other offences) (*continued*)

1. Mr. FRANCIS congratulated the Special Rapporteur on his fourth report (A/CN.4/398). He noted that, in his oral introduction (1957th meeting), the Special Rapporteur had said that the draft articles did not indicate that the list of acts specified as aggression in the Definition of Aggression adopted by the General Assembly[4] was not exhaustive and that the Security Council might determine that other acts constituted aggression under the provisions of the Charter of the United Nations. Since article 4 of the Definition was quite explicit on both those points, they should be reflected in the draft so as to avoid any suggestion that the Commission was in any way proposing an amendment to the Definition.

2. He agreed with the Special Rapporteur's assertions in his report that crimes against humanity could be committed independently of any armed conflict (A/CN.4/398, para. 11) and that the term "humanity" meant the human race as a whole and in its various individual and collective manifestations (*ibid.*, para. 15), which implied that attacks on individuals could, in certain circumstances, constitute crimes against humanity.

3. With regard to the mass element of crimes against humanity, he noted that paragraph 3 (*c*) of article 19 of part 1 of the draft articles on State responsibility referred to "a serious breach on a widespread scale of an international obligation". That was in reference to States, however, whereas in the draft code the Commission was, for the time being, concerned with acts by individuals and must be careful not to over-extend the notion of the mass element.

4. In the Convention on the Prevention and Punishment of the Crime of Genocide, that crime was defined in article II as an act committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group". But the report indicated (*ibid.*, paras. 35-42) that certain single acts committed simultaneously in different locations by different persons, or by one individual at different times, could be construed as genocide if they constituted a pattern of acts directed against a specific group. Moreover, the report stated (*ibid.*, para. 44) that the Supreme Court of the British Zone had held that the mass element was not essential to the legal definition of a crime against humanity, which could consist of a single isolated act.

5. A similar view could be taken with regard to *apartheid*. It was true that paragraph 3 (*c*) of article 19 of part 1 of the draft articles on State responsibility defined *apartheid* as a serious breach of an international obligation on a widespread scale. But since the main object of *apartheid* was the repression of a particular group, any single act of *apartheid* by an individual within the framework of that general object should also be regarded as an offence against the peace and security of mankind. The draft code should make provision for such single instances.

6. In the 1954 draft code, a distinction was drawn in article 2 between acts falling under the heading of genocide, listed in paragraph (10), and other inhuman acts such as murder, extermination, enslavement and deportation, listed in paragraph (11). In his view, that distinction had been made, first, to preserve the identity of the Convention on genocide as an instrument in itself, without impairing its content; secondly, to draw as much as possible on Principle VI (*c*) (Crimes against humanity) of the Nürnberg Principles;[5] and thirdly, to cover as many of the core elements of *apartheid* as possible. The Special Rapporteur considered (*ibid.*, para. 54) that the crime of genocide should be assigned a separate place among crimes against humanity.

7. During the Commission's general discussion, it had been suggested that slavery should also be included in the draft code. There were many reasons for that. For instance, article 19 of part 1 of the draft articles on State responsibility referred to slavery, in paragraph 3 (*c*); Principle VI (*c*) qualified enslavement as a crime against humanity; and article 2, paragraph (11), of the 1954 draft code listed enslavement as an inhuman act. Slavery was therefore recognized as a reality.

8. He agreed that offences involving serious damage to the environment and the offences of complicity, conspiracy and attempt should be included in the draft code.

9. Mr. SUCHARITKUL, commenting on the meaning of the word *humanité* and the word *crime* in the expression *crime contre la paix et la sécurité de l'humanité* (offence against the peace and security of mankind), said that the Special Rapporteur noted in his fourth report (A/CN.4/398, para. 12) three meanings given to the word *humanité*: that of culture, that of philanthropy and that of human dignity. But there was a fourth meaning: the word *humanité* also meant the "human race" or, in orther words, "man" as a biological phenomenon whose integrity had to be safeguarded. Any criminal act against any member of the human race constituted a crime against humanity, and the principle of respect for human integrity should be established in the draft code.

10. The word *crime* might cause difficulties. The Special Rapporteur pointed out (*ibid.*, para. 16) that, in internal law, it referred to the most serious offences,

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[4] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[5] See 1958th meeting, footnote 4.

both in the three-tier division (petty, correctional and criminal offences) and in the two-tier division (correctional and criminal offences). However, the method of classifying offences differed from one legal system to another, and in common-law systems, for example, the term "crime", which had much the same meaning as "criminal offence", designated offences of differing degrees of seriousness (misdemeanours, felonies, etc.). Moreover, in international criminal law, at least where extradition was concerned, the word "offence" (*délit*) was more or less synonymous with the word "crime"; it was practically a generic term. The terms "crimes" and "delicts" used in the expression "international crimes and international delicts" in article 19 of part 1 of the draft articles on State responsibility were rather surprising, since in internal law the distinction between a "crime" and a "delict" made sense only with respect to the two-tier division of offences; but article 19 was drafted from the viewpoint of international law, in which the terms "international crime" and "international delict" were two entirely separate concepts.

11. He agreed with the order in which the Special Rapporteur had classified offences against the peace and security of mankind. With regard to crimes against peace, which came first, it might well be asked whether, in the light of recent events such as the seizure by terrorists of the Italian cruise ship *Achille Lauro* (October 1985), it should not be expressly mentioned that terrorist acts included "piracy on the high seas" or "the seizure of ships". The latter expression would probably be preferable to the former, because it avoided the term "piracy", which had been defined in article 101 (*a*) of the 1982 United Nations Convention on the Law of the Sea as an act "committed for private ends".

12. He saw no reason why the category of crimes against humanity should not include genocide, *apartheid* and inhuman acts, which were all serious offences. He was also in favour of the Special Rapporteur's method of combining definitions with limitative and non-limitative enumerations, as appropriate.

13. Although it was difficult to assess the extent of damage to the environment, he agreed in principle that it could endanger the peace and security of mankind.

14. In the term "war crimes", the word "war", which was already used in the sense of non-international armed conflict in such expressions as "civil war" and "revolutionary war", should not cause any difficulty.

15. As to the "other offences", he approved of the way in which the Special Rapporteur had analysed the concept of complicity, dealing with the complicity of leaders, complicity and concealment, and complicity and membership in a group or organization. He would revert to the question of other offences which might involve the attribution of responsibility at a later stage in the discussion, when he would comment on the general principles. In the mean time, he would only draw the Commission's attention to the fact that, in common-law systems, a conspiracy was not necessarily criminal.

16. Mr. CALERO RODRIGUES congratulated the Special Rapporteur on his fourth report (A/CN.4/398), which he considered one of the best ever submitted to the Commission.

17. Generally speaking, he had always maintained that, as a legal instrument, the code of offences against the peace and security of mankind should expressly identify the offences, the penalties and the competent tribunal, for a list of offences alone would be useful only for political purposes. It would certainly be difficult to achieve that object, because it was doubtful whether States would be prepared to accept an international criminal jurisdiction and it would be difficult for national courts to apply an international code, given the differences between legal systems and the penalties they prescribed. The English title of the code should be changed from "Code of Offences" to "Code of Crimes", to show that it was concerned with only the most serious offences against the peace and security of mankind. Also, since it was to be a criminal code and one of the few instruments of true international criminal law, every crime should be defined precisely as an act, rather than as a situation. That was what the Special Rapporteur had tried to do, and he had largely succeeded in drafting the code as an instrument of criminal law.

18. He agreed with Mr. Sucharitkul on the usefulness of the three-tier division of offences adopted by the Special Rapporteur, although he was not sure that it needed to be stated explicitly in an article of the code. That division would nevertheless be useful, since, in any criminal code, crimes were listed according to their nature, and the original concept of offences against the peace and security of mankind had been arrived at only gradually. Such a classification would therefore be helpful in drafting the code.

19. In his report (*ibid.*, para. 74), the Special Rapporteur raised the question whether the term "war" should not be replaced by the term "armed conflict". "War crimes" were a clearly defined and well-known category of crimes in international law and were traditionally defined as violations of the "laws and customs of war"—a concept currently applied in general to "armed conflicts", as shown by the 1977 Additional Protocols[6] to the 1949 Geneva Conventions. Consequently, war crimes could be committed in armed conflicts, whether or not such conflicts were regarded as wars in the traditional legal sense. While that should be made clear in the code, there was no need to forgo the traditional denomination "war crimes". After all, what had changed was not the concept of war crimes, but the concept of war.

20. With regard to methodology, the Special Rapporteur raised the question (*ibid.*, para. 81) whether the best way of indicating what constituted a war crime was by a general definition or by an enumeration. A general definition would seem preferable. In the 1954 draft code, war crimes were defined generally as "acts in violation of the laws or customs of war" (art. 2, para. (12)). That was the basic idea, but the code should make it clear that only the most serious acts were to be regarded as war crimes. That idea was already contained

[6] Protocol I relating to the protection of victims of international armed conflicts, and Protocol II relating to the protection of victims of non-international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 95 *et seq.*).

in the 1949 Geneva Conventions, which drew a distinction between "breaches" and "grave breaches". The grave breaches could be said to constitute war crimes. No reference should be made in the code to any particular international instrument, since an enumeration of the acts constituting war crimes on the basis of existing conventions would automatically exclude from the scope of the code any new laws or prohibitions relating to the conduct of war. The use of a general definition such as "grave breaches", on the other hand, would maintain a degree of flexibility and automatically include new prohibitions.

21. Historically, the concept of "crimes against humanity" had developed from that of war crimes, but it had subsequently acquired an independent character. He agreed with the Special Rapporteur (A/CN.4/398, para. 11) that: "Today, crimes against humanity can be committed not only within the context of an armed conflict, but also independently of any such conflict." The definition of such crimes was not easy. If "war crimes" were violations of the laws and customs of war, it might be tempting to define crimes against humanity as violations of the laws of humanity. But what were those laws? No matter how appalling conduct contrary to those laws might be, it would seem impossible to transfer to the sphere of international law the idea that such crimes were to be punished internationally. The definition of crimes against humanity should be sought in the concept of *lèse-humanité*, which he understood as meaning acts that were not only abhorrent in themselves, but constituted a threat to the security of humanity in the widest sense of the term. An isolated act of cruelty might be simply repulsive to the human conscience and, as such, should be punished under internal law; but the same act might be indicative of a wider design which could indeed jeopardize the security of mankind.

22. Genocide was a typical example of a crime against humanity. It was not necessary to destroy a national, ethnic, racial or religious group in its entirety; the intention to destroy the group "in whole or in part" was enough. Even causing serious mental harm to members of the group was an act of genocide, as was killing some of its members, whether in a cruel or a "civilized" way. Genocide was so typically a crime against humanity that, in 1948, Georges Scelle had equated the two ideas. *Apartheid*, as defined in the 1973 Convention, also fell into that category. The Convention defined as crimes "acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them" (art. II).

23. Those two well-defined crimes, genocide and *apartheid*, provided the elements which could be generalized to establish what constituted a crime against humanity. The solution suggested by the Special Rapporteur in his report (A/CN.4/398, paras. 60-63) and in draft article 12, paragraph 3, provided a sound basis, but needed some refinement.

24. While the definition of serious damage to the environment as a crime against humanity set out in the report (*ibid.*, para. 66) was generally acceptable, further clarification was needed. The question when a breach of an obligation of essential importance constituted a crime against humanity called for very careful consideration if it was not to give rise to a wider and unacceptable interpretation.

25. Acts of terrorism might be better dealt with as crimes against humanity than as crimes against peace, since they did not affect peace as such, but could threaten the security of mankind as a whole.

The meeting rose at 11.15 a.m.

1960th MEETING

Thursday, 5 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/387,[2] A/CN.4/398,[3] A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART I (Crimes against humanity)

PART II (War crimes) *and*

PART III (Other offences) (*continued*)

1. Mr. CALERO RODRIGUES, continuing the statement he had begun at the previous meeting, said that the thorough analysis of the concepts of complicity, conspiracy and attempt in part III of the fourth report (A/CN.4/398) had led the Special Rapporteur to suggest in draft article 14 three separate offences: first, conspiracy (*complot*), which, in the second alternative proposed by the Special Rapporteur, was defined as "participation in an agreement with a view to the commis-

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

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[3] Reproduced in *Yearbook ... 1986*, vol. II (Part One).